

March 25, 2015

## *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund:* Liability for Opinions in Registration Statements

### **Supreme Court Clarifies When Statements of Opinion in Registration Statements Can Be Actionable**

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#### **SUMMARY**

Yesterday in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, No. 13-435, the U.S. Supreme Court addressed the requirement in Section 11 of the Securities Act of 1933 that a registration statement not “contain[] an untrue statement of a material fact” or “omit[] to state a material fact . . . necessary to make the statements therein not misleading.” Specifically, the Court considered what plaintiffs need to plead under each of those phrases with respect to statements of opinion. The Court’s guidance is significant in light of the importance of pleading standards and motions to dismiss in securities litigation. The Court held, consistent with a majority of the federal courts of appeals, that a pure statement of opinion offered in a Section 11 filing is “an untrue statement of material fact” only if the plaintiff can plead (and ultimately prove) that the issuer did not actually hold the stated belief. At the same time, the Court held that the omission of certain material facts can render even a pure statement of opinion actionably misleading under Section 11. But the Court emphasized that pleading an omissions claim will be difficult because a plaintiff must identify specific, material facts whose omission makes the opinion statement misleading to a reasonable person reading the statement fairly and in context. The Supreme Court’s decision should curtail Section 11 litigation over honestly held opinions that turn out to be wrong, but it may cause the plaintiffs’ bar to bring claims that issuers have not accompanied their opinions with sufficient material facts underlying those opinions. To ward off the risk of such lawsuits, issuers should consider supplementing their disclosure documents with information about the bases of their opinions that could be material to a reasonable investor.

## BACKGROUND

Section 11 of the Securities Act of 1933 authorizes private suits when a registration statement “contain[s] an untrue statement of material fact” or “omit[s] to state a material fact [that is] necessary to make the statements therein not misleading.”<sup>1</sup> The dispute in *Omnicare* arose out of a registration statement that Omnicare filed in connection with a public offering of common stock. Omnicare provides pharmacy services to residents of nursing homes, and the company expressed in its registration statement its opinion that the company’s business model—which includes accepting rebates from pharmaceutical manufacturers—was in compliance with federal and state laws. Omnicare disclosed, however, that the federal government had expressed concerns over manufacturer rebates, and that some States had initiated enforcement actions against manufacturers for providing such rebates.

Pension funds that had purchased Omnicare stock brought suit, contending that the company’s opinions about its legal compliance violated Section 11. The district court dismissed the suit because the funds had not alleged *subjective* falsity—*i.e.*, that Omnicare did not actually believe its opinion statements at the time they were made.<sup>2</sup> But the Sixth Circuit reversed, holding that the funds needed only to allege *objective* falsity—*i.e.*, that the opinions were in fact untrue at the time they were expressed (because Omnicare was not in legal compliance).<sup>3</sup> Because the Sixth Circuit’s decision conflicted with decisions of other federal courts of appeals, the Supreme Court granted review.

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## YESTERDAY’S DECISION

In yesterday’s decision, the Supreme Court reversed the Sixth Circuit’s conclusion “that a statement of opinion that is ultimately found incorrect—even if believed at the time made—may count as an ‘untrue statement of a material fact.’”<sup>4</sup> Writing for a seven-Justice majority, Justice Kagan explained that the Sixth Circuit’s position “wrongly conflates facts and opinions.”<sup>5</sup> When a speaker makes a pure statement of opinion, that statement “explicitly affirms one fact: that the speaker actually holds the stated belief.”<sup>6</sup> Accordingly, a pure statement of opinion in a registration statement gives rise to Section 11 liability as “an untrue statement of a material fact” only if the issuer does not actually hold the opinion at the time.

The Court recognized, however, that some statements of opinion contain embedded factual assertions. For instance, the Court offered the example of an electronics executive who says, “I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access.”<sup>7</sup> That statement, the Court reasoned, offers two facts: one about the speaker’s state of mind (that the product is superior) and one about the company (that the company has an exclusive and patented technology). The Court held that Section 11 may impose liability for “an untrue statement of a material fact” in that circumstance either “if the speaker did not hold the belief she professed” or also “if the supporting fact she supplied were untrue.”<sup>8</sup> The Court nevertheless concluded that Omnicare’s

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statements were pure opinion and thus could not give rise to liability under Section 11 as “an untrue statement of a material fact.”<sup>9</sup>

The Supreme Court then considered whether Omnicare had “omitted to state facts necessary” to make its opinions on legal compliance “not misleading.”<sup>10</sup> The Court rejected Omnicare’s argument that a statement of belief can never convey anything more than the speaker’s own mindset in expressing that opinion. Rather, drawing on common law principles respecting the tort of misrepresentation, the Court held that “a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker’s basis for holding that view.”<sup>11</sup> In the Court’s view, for example, if an issuer offers an opinion on a specific legal compliance matter “without having consulted a lawyer,” “in the face of its lawyers’ contrary advice,” or without disclosing “that the Federal Government was taking the opposite view,” the issuer’s opinion about the legality of its conduct might be “misleadingly incomplete” and give rise to Section 11 liability.<sup>12</sup>

The Court stressed the limits on its interpretation of Section 11’s omission clause. An opinion statement “is not necessarily misleading,” the Court explained, “when an issuer knows, but fails to disclose, some fact cutting the other way,” because “[a] reasonable investor does not expect that every fact known to an issuer supports its opinion statement.”<sup>13</sup> The Court also observed that “[r]easonable investors understand that opinions sometimes rest on a weighing of competing facts; indeed, the presence of such facts is one reason why an issuer may frame a statement as an opinion, thus conveying uncertainty.”<sup>14</sup> In addition, the opinion statement must be read in context, “in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information,” as well as “the customs and practices of the relevant industry.”<sup>15</sup> Further, the Court reaffirmed the doctrine that statements that are “mere puffery” cannot be actionable, but rather must be “determinate, verifiable statement[s].”<sup>16</sup>

In remanding the case to the lower courts to address the funds’ omission claim, the Court emphasized the hurdles that an investor must clear in pressing such a claim: “[t]he investor must identify particular (and material) facts going to the basis for the issuer’s opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context.”<sup>17</sup> According to the Court, “[t]hat is no small task for an investor,” which cannot rely on “conclusory assertions” to plead its claim.<sup>18</sup> Cabined in that way, the Court disagreed with Omnicare that “liability for misleading opinions [would] chill disclosures useful to investors.”<sup>19</sup>

Justices Scalia and Thomas both concurred in separate opinions. Each agreed with the majority that a pure statement of opinion in a registration statement is “an untrue statement of material fact” only if the issuer did not actually hold the opinion at the time of the filing. Both Justices disagreed, however, with the Court’s treatment of Section 11’s omission clause. Justice Scalia would have held that issuers are ordinarily liable for opinions only when the speaker does not truly hold the belief or understands that he

lacks any reasonable basis for the stated belief.<sup>20</sup> Justice Thomas would not have addressed omissions liability but would have left that for the lower courts to address in the first instance.<sup>21</sup>

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## IMPLICATIONS

Yesterday's decision provides important guidance on how Section 11 applies to statements of opinions. The Court's guidance is significant in light of the critical role of pleading standards and motions to dismiss in securities litigation. The Court's decision confirms that Section 11 does not authorize lawsuits based on honestly held opinions in registration statements that subsequently turn out to be wrong. Although the Sixth Circuit's approach had allowed "Monday morning quarterbacking an issuer's opinions,"<sup>22</sup> other federal courts of appeals had disagreed, and yesterday's decision settles the law in line with those other courts by requiring plaintiffs to plead (and ultimately prove) that the speaker did not actually hold the challenged opinion. But when opinion statements contain embedded factual assertions—*i.e.*, when an issuer says that it holds a particular opinion because of some fact—issuers should be careful that they have taken measures to verify the factual assertions underlying those opinions.

The decision may encourage plaintiffs' lawyers to bring litigation over whether issuers have adequately accompanied their opinions with statements about how they formed those opinions—*i.e.*, "facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have."<sup>23</sup> But the Supreme Court made clear that, "to avoid exposure for omissions under [Section] 11, an issuer need only divulge an opinion's basis, or else make clear the real tentativeness of its belief."<sup>24</sup> The Court emphasized that pleading an omissions claim is "no small task for an investor," because the investor must identify specific, material facts "going to the basis for the issuer's opinion . . . whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context."<sup>25</sup>

To guard against the possibility of omissions liability, issuers should consider setting forth the bases for opinion statements in disclosure documents where necessary to prevent any potential confusion. Issuers also should consider whether there are any material assumptions underlying their opinion statements that would not be apparent from the context of the opinion and may be material to a reasonable investor. Because the Supreme Court emphasized the importance of context, including "hedges, disclaimers, or qualifications,"<sup>26</sup> issuers should consider accompanying their opinion statements with language making clear the opinions' uncertainty or limited nature or scope.

Although the Supreme Court's decision rested on the language of Section 11, plaintiffs' lawyers may seek to extend the Court's rationale to claims under other provisions of the securities laws, such as Section 12 of the Securities Act and Sections 10(b) and 14(a) of the Securities Exchange Act of 1934, including with respect to oral or written statements of opinion not crafted with the care and forethought applied to registration statements. The Supreme Court was clear, however, that plaintiffs have substantially less room to claim to have been misled by opinions outside the context of carefully drafted registration

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statements and similar documents: “Investors do not, and are right not to, expect opinions contained in those [registration] statements to reflect baseless, off-the-cuff judgments, of the kind that an individual might communicate in daily life.”<sup>27</sup> Defendants may wish to resist any attempt to extend yesterday’s decision beyond litigation under Section 11 in the context of registration statements.

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ENDNOTES

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<sup>1</sup> 15 U.S.C. § 77k(a).

<sup>2</sup> *Indiana State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 2012 WL 462551, at \*4-5 (E.D. Ky. Feb. 13, 2012).

<sup>3</sup> *Indiana State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 719 F.3d 498, 505-07 (6th Cir. 2013).

<sup>4</sup> *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. \_\_\_\_, No. 13-435, slip op. 6 (Mar. 24, 2015) (quoting 15 U.S.C. § 77k(a)).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 8.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 10.

<sup>11</sup> *Id.* at 11.

<sup>12</sup> *Id.* at 12.

<sup>13</sup> *Id.* at 13 (emphasis in original).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 14.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.* at 18.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1 (Scalia, J., concurring in part and concurring in the judgment).

<sup>21</sup> *Id.* at 1 (Thomas, J., concurring in the judgment).

<sup>22</sup> *Id.* at 9 (majority opinion).

<sup>23</sup> *Id.* at 18.

<sup>24</sup> *Id.* at 19.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 14.

<sup>27</sup> *Id.*

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